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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1014

CITIES SERVICE OIL COMPANY, as Owner of the Steamship *Cities Service Baltimore*,
Petitioner,

against

THE ARUNDEL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	4
Statement of Case	4
Reasons for Granting the Writ	8
1. The decision failing to give effect to the pre-trial order is in conflict with decisions of this Court and of other circuits	8
2. The decision that the *Baltimore* grounded in the channel, despite the fact that all evidence was to the contrary, was clearly erroneous and in conflict with this Court's decisions, as well as those of other circuits	12
a. It was impossible for the *Baltimore* to have grounded within the channel if Government documents were reliable	13
b. The District Court's finding that the *Baltimore* grounded within the channel would have been reversed as clearly erroneous in other circuits, and should have been if this Court's decisions were followed	18
3. The decision exonerating respondent in spite of its vessel's admitted statutory faults and failure to have a proper lookout is in conflict with decisions in this Court and in other cir-	

PAGE

cuits, and is particularly erroneous since respondent rested after petitioner's case, introducing no witnesses in defense..... 22

Conclusion 28

Appendix A—Opinion A-1

Appendix B—Judgment B-1

Appendix C—Denial of Petition for Rehearing..... C-1

Order Denying Petition..... C-2

Appendix D—Order Extending Time to File Petition for Writ of Certiorari..... D-1

Appendix E—Statutes and Rules Involved..... E-1

Table of Cases.

	PAGE
Clifton v. *United States*, 45 U. S. 242	28
Davis v. *Parkill-Goodloe Company*, 302 F. 2d 489 (5 Cir. 1962)	20
Deep Sea Tankers v. *The Long Branch*, 258 F. 2d 757 (2 Cir. 1958); *certiorari denied*, 358 U. S. 933, *rehearing denied*, 359 U. S. 921	24
Ekco Products Company v. *Chicago Metallic Manufacturing Company*, 321 F. 2d 550 (7 Cir. 1963), *certiorari denied*, 375 U. S. 970, *rehearing denied*, 376 U. S. 929	20
Esso Standard Oil Co. v. *The President Garfield*, 279 F. 2d 540 (2 Cir. 1960)	24
Fanchon & Marco, Inc. v. *Haggenback Wallace Shows Co.*, 125 F. 2d 101 (9 Cir. 1942)	11
Fowler v. *Crown Zellerbach*, 163 F. 2d 773 (9 Cir. 1947)	11
Frank v. *Grisey*, 117 F. 2d 122 (9 Cir. 1941)	11
Hoppe v. *Rittenhouse*, 279 F. 2d 3 (9 Cir. 1960)	21
John H. Starin, 112 Fed. 236 (2 Cir. 1903)	27
Kline v. *S. N. Flickinger Co.*, 314 F. 2d 464, 466-467 (3 Cir. 1963)	11
Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO v. *Humko Co.*, 287 F. 2d 231 (6 Cir. 1961), *certiorari denied* 366 U. S. 962	20
MacMullen v. *South Carolina Electric & Gas Company*, 312 F. 2d 662 (4 Cir. 1963)	19
McAllister v. *United States*, 348 U. S. 19	3, 8, 12, 19, 21
McGowan v. *United States*, 296 F. 2d 252 (5 Cir. 1961)	20
Merritt-Chapman & Scott Corp. v. *Cornell Steamship Co.*, 265 F. 2d 537 (2 Cir. 1959)	26
Moran Bros., Inc. v. *W. R. Yinger*, 323 F. 2d 699 (10 Cir. 1963)	21

PAGE

Pendleton v. *Pan American Fire and Casualty Company*, 317 F. 2d 96 (10 Cir. 1963), *certiorari denied* 375 U. S. 905 21

Philadelphia & R. R. Co. v. *River & Harbor Improvement Co.*, 193 Fed. 109 (3 Cir. 1910) 27

Ringling Bros. Barnum & Bailey C. Shows v. *Olvera*, 119 F. 2d 584 (9 Cir. 1941) 11

Sachs v. *Commissioner of Internal Revenue*, 277 F. 2d 879 (8 Cir. 1960), *certiorari denied*, 364 U. S. 833 20

Sawyer v. *United States*, 298 F. 2d 333 (D. C. Cir. 1962) 19

The City of Birmingham, 138 Fed. 555 (2 Cir. 1905) 22

The Fort Fetterman v. *South Carolina State Highway Department*, 261 F. 2d 563 (4 Cir. 1958) 26

The Freedom, 58 F. 2d 170 (2 Cir. 1932) 22

The New York, 175 U. S. 187 28

The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148 ..... 3, 4, 8, 26

United States v. *Certain Interests in Property in Cumberland County*, 296 F. 2d 264 (4 Cir. 1961) 19

United States v. *Houghan*, 364 U. S. 310 ..... 10, 11

United States v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381 (8 Cir. 1960) 20

United States v. *United States Gypsum Co.*, 333 U. S. 364, *rehearing denied*, 333 U. S. 869 12

United States v. *Yellow Cab Co. et al.*, 338 U. S. 338 18

W. R. B. Corporation et al. v. *Odell Geer, et al.*, 313 F. 2d 750 (5 Cir. 1963) 19

STATUTES AND RULES.

Federal Rules of Civil Procedure,

Rule 15 10

Rule 16 ..... 4, 8, 9, 10, 12

Rule 52(a) 4, 8, 12, 19, 20, 21

PAGE

Code of Federal Regulation,

33 C. F. R. 80.26 ..... 4, 5, 23

33 C. F. R. 80.30 ..... 4, 24

33 C. F. R. 31 ..... 4, 25

United States Code,

33 U. S. C. 203 ..... 4, 23

33 U. S. C. 221 ..... 4, 26

33 U. S. C. 409 ..... 4, 22

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Cities Service Oil Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on November 2, 1964.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is reported at 337 F. 2d 842, and is reprinted in Appendix A hereto. The opinion of the Court of Appeals for the Second Circuit with regard to petitioner's petition for rehearing is unreported, but is reprinted in Appendix C hereto.

The opinion of the District Court for the Southern District of New York is reported at 1963 A. M. C. 1567 and is reprinted in the appendix filed with the Court of Appeals for the Second Circuit (R. 3-7).

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on November 2, 1964 (R. 172, Appendix B hereto). The petitioner filed a timely petition for rehearing on November 17, 1964 (R. 174-178), which was denied by the Court of Appeals on December 15, 1964 (R. 179, Appendix C hereto). Petitioner's application for an extension of time within which to file this petition from March 15, 1965, to March 22, 1965, was granted by Mr. Justice Harlan. (Appendix D hereto). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. Whether a United States District Court and Court of Appeals may ignore the pretrial order of another federal judge, which set forth the detailed issues to be tried following pretrial conferences, and decide a case on an issue not contained in that pretrial order, nor mentioned in the pleadings.

2. Whether a libelant, which introduces both testimony and documentary evidence meeting its burden of proof under each issue set forth in the pretrial order, is entitled to have that evidence construed or considered in a favorable light when respondent rests after libelant's direct case and introduces no defense.

3. Whether the Court of Appeals, in considering the claimed erroneous dismissal of a libel, should, in a case where no defense has been introduced, review the evidence in a manner favorable to libelant.

4. What is the limit beyond which a Circuit Court cannot go in avoiding its appellate factual review responsibilities under decisions of this Court, such as *McAllister* v. *United States,* 348 U. S. 19, which expound the "clearly erroneous" basis for refusing to change a district court's factual determinations.

5. Did this Court intend the "clearly erroneous" test for appellate review of fact issues to apply to cases in which the evidence of only the libelant is before the lower courts, and those lower courts base their opinions upon their interpretation of one statement of only one of libelant's witnesses, despite the absence of any testimony from the respondent.

6. Whether the District Court and Court of Appeals were both grossly in error in finding that the "*Cities Service Baltimore*" not only grounded in the channel, but would have grounded anywhere in that entire area of the channel because the "controlling depth" was the same.

7. Whether a United States District Court and Court of Appeals may ignore the presumptions established by decisions of this Court as to the effect of respondent's failure to produce material witnesses to dispute any facts established by petitioner.

8. Whether a United States District Court and Court of Appeals may ignore the presumptions established by this Court in *The Pennsylvania,* 19 Wall 125, 86 U. S.

125, 136, and succeeding cases, that each of respondent's statutory faults, as well as its failure to have a proper lookout, imposed upon respondent the strict burden of proving that its vessel's faults could not have been one of the causes of the casualty.

Statutes and Rules Involved.

Rule 16 and 52 of the Federal Rules of Civil Procedure, which cover pre-trial procedure and findings by the court; Sections 80.26, 80.30 and 80.31, of Title 33, Code of Federal Regulations, which are regulations concerning passing a floating plant working in navigable waters; and Sections 203, 221 and 409, of Title 33, United States Code, which deal with whistle signals, lookout and obstruction of navigable waters, are involved. They are printed in Appendix E, hereto.

Statement of Case.

The suit was one within the District Court's admiralty jurisdiction, originated by the libel of Cities Service Oil Company, as owner of the steamship *Cities Service Baltimore,* seeking recovery for damages to that vessel resulting from respondent's failure to comply with any of its statutory duties, under the circumstances.

The following statement of facts, based upon petitioner's evidence, was undisputed, since respondent failed to produce its witnesses and rested after the completion of petitioner's case.

The *Cities Service Baltimore* (hereinafter referred to as the *Baltimore*), having a draft of 32 feet 4 inches forward and 32 feet 3 inches aft (As found by both lower court's R. 5, A-2), got underway from her Stapleton anchor-

age off the northeast shore of Staten Island, at 0152 December 2, 1957, to discharge her cargo of petroleum products at the Cities Service plant in Linden, New Jersey. The *Baltimore,* a tanker 661 feet in length with a 91 foot beam, was assisted by two tugs and was being navigated by an experienced Sandy Hook pilot under the supervision of her Master, Third Officer, and the chief Cities Service pilot (R. 23, 25, 67, 89, 123).

The *Baltimore* was steady on her course at the head of the Gulfport Reach and her engine put on dead slow ahead at about 0407. (See Chart Exhibits 3, 4, and 11, also reproduced at R. 153, 155 163). At this time respondent's *Drill Boat No. 3,* a vessel 114 feet in length with 38 foot beam, was sighted below the 40 degree easterly bend in the next Reach, the Prall's Island Reach. The *Baltimore* sounded a single long blast whistle signal indicating her intention to pass *Drill Boat No. 3,* as required by Pilot Rule 80.26. (33 C. F. R. 80.26), but no reply was received (As found by both lower courts, R. 4, A-2). The *Baltimore's* purpose in sounding this one blast was, as stated in Pilot Rule 80.26, to receive a direction from the drill boat as to the side on which the *Baltimore* should pass. The *Baltimore* sounded several additional one-long blast whistle signals to *Drill Boat No. 3,* none of which were answered. During this interval, the *Baltimore's* speed was gradually being reduced to bare steerageway. She next sounded a danger signal and again repeated the one-long blast whistle signal in an attempt to get some response from *Drill Boat No. 3.* The danger signal followed by one-long blast was repeated a number of times, but no response of any type required by Pilot Rule 80.26 was received from the drill boat (As found by both lower courts R. 4, A-2).

The experienced officers on the *Baltimore's* bridge, after consultation, decided that, in view of the drill boat's appar-

ent position below the bend in about the middle of the 400 foot channel, and with two oil barges moored abreast slightly downstream from the drill boat on the New Jersey side, it would be best to pass on the Prall's Island side (the Staten Island side) to avoid danger of collision with the drill boat and still stay afloat within the channel. (As found by both lower courts, R. 5, A-2). There was still a considerable expanse of water beyond the channel edge on the eastern side, and there were no navigational aids in that area to mark the eastern channel limit (R. 60; Ex. 4, R. 154).

Although those aboard the *Baltimore* thought the drill boat was in about mid-channel (R. 29, 68, 76), she was actually closer to the eastern channel edge (R. 103, 105, 117). *Drill Boat No. 3,* with knowledge of its own position and from its vantage point, knew whether or not there was sufficient room to pass her on the New Jersey side, which fact was obviously not apparent to a vessel in the *Baltimore's* position (R. 59, 60, 117-118; Ex. 4, R. 154). Since no direction was received from the drill boat, and the *Baltimore's* only apparent safe course to avoid collision and remain afloat within the chanel was to pass as close on the Prall's Island side to the drill boat as possible, with her safety in mind, the tug on the *Baltimore's* starboard bow was shifted to her port quarter at 0415 and the *Baltimore's* engine, which had been stopped, was put on dead slow ahead. She was then maneuvered to attempt to pass parallel to the drill boat within about 50 to 75 feet, so as to remain within the channel; however, as the *Baltimore's* bow moved abreast of the drill boat, the *Baltimore* went hard aground at 0422½ (R. 33-35, 60-61, 79, 86, 91, 93, 128-129; Ex. 8, R. 156).

Her forward port side, about 120 feet from the bow, was found to be aground (R. 38, 39, 78, 130) outside the

channel, as confirmed by soundings (R. 69-70; Ex. 9, R. 156; Ex. 11, R. 162) and by bearings taken on shore points (R. 37, 70, 130-131; Ex. 11, R. 162) from the compass repeater on the starboard side of the *Baltimore's* bridge which fixed that point, and the rest of the *Baltimore's* beam, as being outside the eastern edge of the 400 foot channel (R. 132; Ex. 9. R. 158; Ex. 10, R. 160). That position was also confirmed by the contemporaneous bearing and distance noted in the *Baltimore's* deck log (Ex. 10, R. 160), and by her Master's plots (Ex. 9, R. 159; Ex. 11, R. 162; R. 131-133, 137).

Petitioner subpoenaed respondent's superintendent during the trial when it was discovered that he was about to leave the jurisdiction without testifying (R. 100). He had testified at the United States Coast Guard hearings in this matter (R. 101), as had respondent's other non-produced witnesses. This gentleman admitted that the *Baltimore's* forward section following her grounding was outside the eastern edge of the 400 foot channel (R. 110).

Despite this overwhelming and uncontradicted evidence, the District Court found and the Circuit Court affirmed that the *Baltimore* grounded within the channel and excused all of respondent's statutory faults and omissions. This issue of where the *Baltimore* grounded was not even before the courts, since not incorporated in the pretrial order (R. 15-16), nor did respondent amend its pleadings or offer any proof on that or any other issue. Respondent's defense had been based on the claim that the *Baltimore* sounded no whistle signals, and that, if she had she would not have grounded in the shoal water, since there was ample water to the westward, to which the drill boat would have directed her (R. 13; Appellate Brief, pp. 21-24). Respondent admitted in the pretrial order that the drill boat sounded no whistle signals and the principal issue was stated to be

> "(b) whether the *Cities Service Baltimore* signalled *Drill Boat No. 3*, in accordance with the applicable regulations, it being claimed by the *Cities Service Baltimore* that she so signaled repeatedly;" (R. 15-16).

The Court of Appeals thereafter denied petitioner's petition for rehearing to correct its opinion.

Reasons for Granting the Writ.

The lower courts' opinions in this case disregard this Court's prior decisions in the line of cases interpreting the binding effect of a pretrial order issued under Rule 16, of the Federal Rules of Civil Procedure; in the *McAllister* v. *United States*, 348 U. S. 19, line of cases involving the "clearly erroneous" standard of factual review as stated in Rule 52(a), of the Federal Rules of Civil Procedure; and in *The Pennsylvania*, 19th Wall. 125, 86 U. S. 125, 136, line of cases regarding statutory faults. The opinions herein also reflect a lack of uniformity among the circuits, and differences of opinion, as to the proper interpretation of this Court's prior opinions on these important and far reaching issues. This case presents the further complicating factor to be applied to each of the above issues of the effect of a respondent's failure to introduce any defense to petitioner's charges and proofs of fault. This question does not appear to have been decided, as yet, by this Court.

1. The decision failing to give effect to the pre-trial order is in conflict with decisions of this Court and of other circuits.

Since 1951, the pretrial conference has become a mandatory feature of every civil case in the Southern District,

including admiralty cases. Promptly following the close of a pretrial conference, a pretrial order is prepared by the pretrial judge, and, as provided by Rule 16 of the Federal Rules of Civil Procedure:

> "such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

Respondent in this case, consistent with its contentions to that time, agreed in the pre-trial order (R. 15-16) signed by the District Judge that

> "(viii) The issues to be tried are formulated by the court as follows:
>
> (a) whether *Drill Boat No. 3* maintained a proper lookout and whether she complied with the applicable statutes and regulations;
>
> (b) whether the *Cities Service Baltimore* signalled *Drill Boat No. 3,* in accordance with the applicable regulations, it being claimed by the *Cities Service Baltimore* that she so signalled repeatedly;
>
> (c) whether any action of the respondent or failure of action by the respondent caused or contributed to the grounding of the *Cities Service Baltimore;* and whether any action or failure of action on the part of the *Cities Service Baltimore* caused or contributed to the grounding of the *Cities Service Baltimore.*"

These then were the issues which petitioner was prepared to meet and did meet through its evidence. Respondent introduced nothing to vary these issues nor to dispute petitioner's evidence. There was no issue framed for trial as to whether the *Baltimore* grounded *in the channel,* as the lower courts found, or in the shoal water outside the channel. That she grounded outside the channel had been

an accepted fact prior to the trial, and was established by undisputed evidence during the trial.

This Court stated, in *United States* v. *Houghan*, 364 U. S. 310, 315-316,

> "• • • That pretrial order, as authorized by Rule 16, conclusively established the issues of fact and law in the case and declared that the issues so established should 'supplement the pleadings and govern the course of the trial. . . .' • • •. That such was the effect of the order is clear from the language of Rule 16 which provides that the Court, after pretrial conference, 'shall make an order which recites . . . the amendments allowed to the pleadings . . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.''

However, the majority held that since the pretrial order reserved the legal question of the Government's right to change its election under the statute there involved, and that question was decided against the Government, the question was not waived.

Mr. Justice Whittaker, joined in dissenting by Mr. Justice Douglas, stated (pp. 322-323) that two of the objects of Rule 16 were to simplify the issues, and to consider amendments to the pleadings. In simplifying the issues

> "• • • , the Court may, by the pretrial order, define the issues to be tried, *but those issues must be within the pleadings*. • • •"

The dissent held that the Government did not seek leave to amend its pleadings as permitted by Rule 15, and should be bound by its final complaint.

In the present case, respondent neither reserved any issue, nor sought leave to amend its pleadings either before

or during the trial. Respondent also failed to offer any defense and yet the District Court determined this case on an issue not before it, conceivably the only issue which could protect respondent. The Court of Appeals affirmed this basic error in turn ignoring the fact that the controlling issue was not stated in the pretrial order. This decision is in conflict with this Court's decision in *United States* v. *Hougham*, 364 U. S. 310, and with other circuits.

In *Kline* v. *S. N. Flickinger Co.*, 314 F. 2d 464, 466-467 (3 Cir. 1963), the Court restricted the issues at trial to those set forth in the pretrial stipulation even though no pretrial order had been entered. In *Ringling Bros.-Barnum & Bailey C. Shows* v. *Olvera*, 119 F. 2d 584, 586 (9 Cir. 1941), evidence was adduced from which it could be inferred that contract had been executed in a different state than stipulated, but the pretrial order was not modified and the Court held the stipulation binding. In *Frank* v. *Grisey*, 117 F. 2d 122, 127 (9 Cir. 1941), the Court stated that, "where the pretrial procedure is resorted to the spirit of the procedure must be observed." The pretrial order, whether later modified or not, is also controlling on appeal. *Frank* v. *Grisey*, 117 F. 2d 122 (9 Cir. 1941); *Fanchon & Marco, Inc.* v. *Haggenback Wallace Shows Co.*, 125 F. 2d 101 (9 Cir. 1942); and *Fowler* v. *Crown Zellerbach* ,163 F. 2d 773 (9 Cir. 1947).

If respondent had any objection to the pretrial order, particularly to the statement of the issues to be tried, that objection should have been made at the pretrial conference and renewed at the trial. Otherwise, according to the decisions, the point is waived. No such objection or request for amendment was made.

There would be no point in having pretrial procedure, if the District Court could ignore the pretrial order, although petitioner met its burden on all the issues ordered

to be adjudicated, and decide a case on an issue not before it and not reflected in the pleadings. Both the District Court and Circuit Court were clearly in error in ignoring Rule 16 and the applicable interpretations.

2. The decision that the *Baltimore* grounded in the channel, despite the fact that all evidence was to the contrary, was clearly erroneous and in conflict with this Court's decisions, as well as those of other circuits.

This Court in *McAllister* v. *United States,* 348 U. S. 19 stated at page 20:

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure * * *."

The test that findings of fact shall not be set aside unless clearly erroneous gave considerable discretion to the reviewing court and this Court, in attempting to define the Rule 52(a) standard, stated:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

United States v. *United States Gypsum Co.,* 333 U. S. 364, 395, *rehearing denied,* 333 U. S. 869.

This Court in applying the same standard to findings of fact in admiralty cases in *McAllister* v. *United States,* 348 U. S. 19, obviously did not intend to remove all fact

finding considerations from the Circuit Courts' province. However, many Circuit Courts appear to have used this Court's language as a means to avoid delving into factual matters which require and demand Appellate review. Further, many District Courts appear to place decisions on a purely factual basis, although there are recognized legal issues involved, realizing that the Circuit Court will tend to find the facts not "clearly erroneous". It seems apparent that the Second Circuit in this case may have so used the *McAllister* doctrine, to avoid dealing with the facts in this admiralty suit wherein the District Court was grossly in error in basing its opinion on a finding which was clearly impossible, and refuted by the undisputed documentary evidence.

a. It was impossible for the *Baltimore* to have grounded within the channel if Government documents were reliable.

There was no affirmative testimony that the vessel grounded within the channel. The testimony was that she grounded outside the channel, supported by concurrent records, and Government documents. Despite this, the District Court found that the *Baltimore* grounded within the channel (R. 5); the Circuit Court parrotted this finding (A-3). The District Court evidently did not understand the relationship between the tide and channel depths.

> "* * *. The area of the occurrence had a controlling depth of twenty-nine and a half feet, at *most* thirty feet, at mean low water. With her draft of thirty-two feet, four inches, the tanker could have affected safe passage in the channel only at high water and then only if the predicted tide had materialized" (R. 5). (Italics ours)

The Circuit Court found

> "* * *. The Prall's Island Reach channel is 400 feet wide where the accident occurred, with a controlling

> depth-minimum depth of the channel at mean low water as found in government surveys—of twenty-nine and a half or thirty feet" (A-2).

The District Court then gave blanket approval for respondent's failure to move or direct the *Baltimore* to the New Jersey side of the channel by finding,

> " * * * . However, *the controlling depth of the channel at the entire area* where the casualty occurred *was the same.* Had advice been given to proceed on the New Jersey side, the result could hardly have been any different" (R. 6). (Italics ours)

This finding was the sole basis upon which the Circuit Court affirmed the District Court's judgment and excused respondent's negligence and statutory faults:

> "Once it is decided that the tanker went aground within the channel, judgment for the respondent necessarily follows. All available information showed that *the same controlling depth,* whether it was twenty-nine and a half or thirty feet, *prevailed for the full width of the channel.* In other words, one course within the channel appeared to be as good as another, and the acts and omissions of the drill boat did not increase the tanker's chances of grounding within the channel.
>
> "The judgment of the district court is affirmed" (A-3). (Italics ours)

It is clear that neither court knew what "controlling depth" meant. The District Court thought it meant "at most thirty feet" (R. 5) of water; the Circuit Court a "minimum depth of the channel at mean low water as found in government surveys" (A-2) of thirty feet. The government surveys did not so find, nor did "All avail-

able information show(ed) that the same controlling depth. * * * , prevailed for the full width of the channel" (A-3).

These findings are clearly erroneous. Chart No. 285, issued September 4, 1957, by the United States Coast and Geodetic Survey (Ex. 3, R. 153), showed a controlling depth of 29 and 1/2 feet of water at mean low water inside the channel in the area here involved. Subsequent to the issuance of Chart No. 285, the United States Army Corps of Engineers, in connection with letting the contract to respondent to increase the channel width to 500 feet and depth to 35 feet, prepared a detailed chart of the project area from sounding surveys taken on October 7, 10, 11, 17, 21 and 24, 1957, less than six weeks before this grounding (R. 104; Ex. 9, R. 159). That chart showed depths of 32 feet or more at mean low water within the section of the 400 foot wide existing channel where the *Baltimore* was found by the District and Circuit Courts to have grounded. According to United States Coast Guard, Notice to Mariners No. 56, dated November 27, 1957 (Ex. "B", R. 166), the United States Army Corps of Engineers then notified the Coast Guard, who, in turn, advised navigators using Chart 285, through that Notice to Mariners, that the controlling depth was then 30 feet.

It is clear from Exhibit "A" (R. 165), the tide graph prepared by the United States Army Corps of Engineers and accepted in evidence as part of the pretrial order (R. 15), that during the period for 1 and ½ hours following the *Baltimore's* grounding the rise in tide was from 2 feet 11 inches to 3 feet 1 and 3/5 inches (Ex. "A", R. 165).

The minimum rise in tide during the *Baltimore's* approach, based upon this tide graph, until her grounding at 0422½ was 2 feet 11 inches. Even if the 29 and ½ foot "controlling depth" were used, it is evident that 29 and ½ feet, plus 2 feet 11 inches would give a minimum "control-

ling depth" at that time of 32 feet 5 inches. This is 1 inch more than the *Baltimore's* draft forward and 2 inches more than her draft aft (as found by both lower courts, R. 5, A-2). Despite the fact that the Army Engineers tide graph (Ex. "A", R. 165) shows that the tide rose 2 and 3/5 inches during the next hour, the *Baltimore* remained hard aground despite using her own power and being assisted by six tugs (R. 147; Ex. 1, R. 151, p. 44). At this time the *Baltimore* would have had 3 and 3/5 inches under her deepest draft. Both the District and Circuit Court ignored the fact that the *Baltimore* could not have grounded within the channel, even based upon their incorrect minimum depth finding, which was in fact shown to have been much less than the actual depths, according to the Government documents in evidence.

Using the 30 foot minimum controlling depth published by the Coast Guard (Ex. "B", R. 166), based upon the information supplied by the Corps of Engineers, the findings of the two lower courts are clearly demonstrated to be even more erroneous. Adding the 2 foot 11 inch rise in tide at the time of the grounding, to the 30 foot controlling depth published one week before the grounding, it is evident that the *Baltimore* had 7 inches of water beneath her deepest draft. However, the tide later rose during the period she was aground 2 and 3/5 inches, so that at that time the *Baltimore* had 9 and 3/5 inches under her deepest draft. She remained hard aground despite the assistance of six tugs attempting to move her (R. 147; Ex. 1, R. 151, p. 44).

Both lower courts ignored the Coast Guard's clear statement in the Notice to Mariners (Ex. "B", R. 166), that the channel "has a general depth of 30 or more feet below mean low water." The 29 and ½ or 30 foot controlling depths were not the actual channel depths, but merely the

safe channel depths published by the United States Coast Guard, the United States Army Corps of Engineers and the United States Coast and Geodetic Survey. The Corps of Engineers chart tabulating the actual depths compiled from sounding surveys taken (Ex. 9, R. 159) shows no depths of less than 32 feet at mean low water within the eastern part of the channel where the *Baltimore* was found to have grounded by the District and Circuit Courts. Adding to this the 2 feet 11 inch rise in tide at the time the *Baltimore* grounded, the *Baltimore* would have had 2 feet 7 inches of water beneath her deepest draft. An hour later, when the rise in tide was 3 feet 1 and 3/5 inches, the *Baltimore* would have had 2 feet 9 and 3/5 inches of water under her deepest draft. Nevertheless, she remained hard aground at that time, despite efforts to free her using her own power and the assistance of six tugs (R. 147; Ex. 1, R. 151, p. 44).

Obviously, the *Baltimore* could not have grounded within the channel unless all Government documentary evidence introduced in the lower courts was inaccurate, and the testimony of all witnesses was untrue. It is difficult to see how the crucial finding upon which the lower courts' opinions are based could be more clearly erroneous.

Although differences in water depths in and outside the channel was of prime importance, neither lower court seemed to grasp its significance (R. 63). Both courts ignored the fact that soundings taken from the *Baltimore* following the grounding, showed a depth of 30 and ½ feet where the vessel was aground, and depths of from 34 to 36 feet of water toward the stern (A. 69-70). Using the height of tide from the tide graph (Ex. "A", p. 165), it is clear that the *Baltimore* was aground in an area where there was no more than 28 feet of water, 1 and ½ feet less than the controlling channel depth shown on Chart No. 285 (Ex. 3,

R. 153) (which we have shown was not the true depth of the water in the channel). That chart clearly depicts shoals of 26 and 28 feet outside the 400 foot channel on the Prall's Island side. Notice to Mariners No. 56, (Ex. "B", R. 166) also notes such shoal water outside the 400 foot channel in the area adjacent to Prall's Island. It would have been impossible for the *Baltimore* to have found such soundings unless her forward section were, in fact, aground outside the channel edge. No such depths could exist within the channel unless all of the Government publications, documents and surveys in evidence were grossly inaccurate.

b. The District Court's finding that the *Baltimore* grounded within the channel would have been reversed as clearly erroneous in other circuits, and should have been if this Court's decisions were followed.

Petitioner devoted much of its brief, reply brief and petition for rehearing in the Court of Appeals, (copies of which have been certified and filed herewith) to a detailed documentation of the impossibility of the District Court's finding that the *Baltimore* grounded in the channel.

Despite the above clear undisputed evidence that the *Baltimore* grounded outside the channel, Court of Appeals affirmed that she grounded in the channel because her draft was too great and concluded that none of *Drill Boat No. 3's* admitted statutory faults contributed to that grounding, because even if *Drill Boat No. 3* had obeyed her statutory duties, the *Baltimore* would still have grounded anywhere she was directed within the channel (A-3, R. 6). This finding should have been reversed as clearly erroneous, and does not reflect "a choice between two permissible views of the weight of the evidence," *United States* v. *Yellow Cab Co. et al.*, 338 U. S. 338, 342, neither does it reflect "substantial evidence from which the District Court could

find that respondent was (not) negligent." *McAllister* v. *United States,* 348 U. S. 19, 22.

The Circuit Courts, in carrying out this Court's present general criteria, refuse to change factual determinations in the overwhelming majority of cases brought before them. However, there is little uniformity in the standard applied, some Circuits apply far stricter criteria as to what is "clearly erroneous" than others, and seldom reverse findings of fact, no matter how glaring the errors. The Second Circuit's extremely narrow interpretation results in appellants there being deprived of the complete consideration to which they are entitled.

Circuits differ as to what is "clearly erroneous" but are more liberal than is the Second Circuit. *Sawyer* v. *United States,* 298 F. 2d 333 (D. C. Cir. 1962), findings were not clearly erroneous when, although there was conflicting evidence, there was adequate basis for the court's findings; *United States* v. *Certain Interests in Property in Cumberland County,* 296 F. 2d 264, 269 (4 Cir. 1961), where evidence was in virtual equilibrium, findings could not be rejected, "such findings are based on substantial, though conflicting, testimony"; *MacMullen* v. *South Carolina Electric & Gas Company,* 312 F. 2d 662, 670 (4 Cir. 1963), "clearly erroneous" provision subject to exception and modification, and reversed as lower court had applied improper standards of interpretation to essentially undisputed facts which also gave rise to erroneous conclusions of law; *W. R. B. Corporation et al.,* v. *Odell Geer, et al.,* 313 F. 2d 750, 753 (5 Cir. 1963), to pass the "clearly erroneous" test the evidence must be substantial, and the clearly erroneous concept of Rule 52(a) requires findings to be set aside if the court is left with the impression that the result is not the truth and right of the case; *Davis* v.

Parkill-Goodloe Company, 302 F. 2d 489, 491 (5 Cir. 1962), findings resulting from a misapprehension of controlling substantive principles lose the insulation of Rule 52(a) and a judgment based thereon cannot stand; *McGowan* v. *United States,* 296 F. 2d 252, 254 (5 Cir. 1961),

> "* * * we must be certain that in making credibility choices—particularly of the basic kind in which the question resolves around the selection of one of two divergent statements—the trier of fact has evaluated them in the light of proper legal standards."

Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO v. *Humko Co.,* 287 F. 2d 231, 239 (6 Cir. 1961), *certiorari denied,* 366 U. S. 962, after a detailed examination of *all* the evidence it was "left with a definite and firm conviction" that "no 'mistake had been committed' " and that there was "substantial evidence to support the findings of the Trial Judge"; *Ekco Products Company* v. *Chicago Metallic Manufacturing Company,* 321 F. 2d 550, 552, 555-556 (7 Cir. 1963), *certiorari denied,* 375 U. S. 970, *rehearing denied,* 376 U. S. 929, not required to accept findings if unsupported by the evidence or clearly erroneous and reversed finding that disputed patent claims yielded no new result; *Sachs* v. *Commissioner of Internal Revenue,* 277 F. 2d 879, 881 (8 Cir. 1960), *certiorari denied,* 364 U. S. 833,

> "* * *. If the Tax Court's finding here is supported by substantial evidence upon the record as a whole, and is not against the clear weight of the evidence or induced by an erroneous view of the law, it cannot be disturbed upon appeal."

United States v. *Mississippi Valley Barge Line Co.,* 285 F. 2d 381, 388 (8 Cir. 1960), case submitted upon stipu-

lated facts and documentary material and no conflict in the evidence, or in the inferences which reasonably can be drawn therefrom, it could rule upon the questions of law presented and was not restricted by the limitations of Rule 52(a); *Hoppe* v. *Rittenhouse*, 279 F. 2d 3, 9 (9 Cir. 1960), no reluctance in finding a factual conclusion from given facts clearly erroneous where the primary facts would admit but one reasonable conclusion; *Pendleton* v. *Pan American Fire and Casualty Company*, 317 F. 2d 96, 99, 101 (10 Cir. 1963), *certiorari denied*, 375 U. S. 905, when evidence is not in conflict and the basic facts necessary to a disposition of the case are not in dispute, it must conclude that the ultimate facts or bare conclusions of fact found by the trial court which are inconsistent with those basic facts are clearly erroneous; and *Moran Bros., Inc.* v. *W. R. Yinger*, 323 F. 2d 699, 702-703 (10 Cir. 1963), the Tenth Circuit stated:

> "Thus, while there is some evidence tending to support the court's finding, we are, nevertheless, 'on the entire evidence left with the definite and firm conviction that a mistake has been committed.' It therefore follows that the finding of fact in question is clearly erroneous."

The finding that the *Baltimore* grounded within the channel would be clearly erroneous under any of these interpretations and should be reversed by this Court. *McAllister* v. *United States*, 348 U. S. 19, 21.

3. The decision exonerating respondent in spite of its vessel's admitted statutory faults and failure to have a proper lookout is in conflict with decisions in this Court and in other circuits, and is particularly erroneous since respondent rested after petitioner's case, introducing no witnesses in defense.

The right of navigation is primary in a navigable channel and any infringement upon that right by vessels such as *Drill Boat No. 3* should be carefully scrutinized.

> "Obstruction of Navigable Waters by Vessels; * * *
>
> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; * * *" (33 U. S. C. §409)

This is particularly true in a narrow channel such as Arthur Kill. *The Freedom,* 58 F. 2d 170, (2 Cir. 1932).

In *The City of Birmingham,* 138 Fed. 555, 559 (2 Cir. 1905), referring to the statute regarding anchoring in navigable channels, the court said:

> "* * * It seems to us that a *dredge anchored at night 200 feet from the center of the channel of a narrow river,* where a seven-foot tide ebbs and flows *and within half a mile of a sharp bend,* is within the mischief if not within the strict letter of the statute. Such a craft *does not prevent navigation in the sense of stopping it altogether, but* by crowding all navigation practically into the northern half of the channel *she obstructs the passage of other vessels; that is, she hinders, impedes, embarrasses and interrupts their progress.* * * * *the precautions taken by a vessel anchoring in a dangerous position should be commensurate with the perils assumed.* The Clara,

> 102 U. S. 200, 26 L. Ed. 145; The Sapphire, 11 Wall. 164, 170, 20 L. Ed. 127." (Italics ours)

33 C. F. R. 80.26 (Pilot Rule 80.26) requires that

> "Vessels intending to pass dredges or other types of floating plant working in navigable channels * * * shall indicate such intention by one long blast of the whistle, and shall be directed to the proper side for passage by the sounding * * * of the signal prescribed in the local pilot rules for vessels under way and approaching each other from opposite directions, which shall be answered in the usual manner by the approaching vessel. If the channel is not clear, the floating plant shall sound the alarm or danger signal and the approaching vessel shall slow down or stop and await further signal from the plant."

The uncontradicted testimony was that the *Baltimore,* sounded the one long whistle blast signal required by the statute at least several times (R. 29-30, 66-67, 85, 89-90, 124-125). These signals were not answered, nor did the drill boat sound the danger signal required if the channel was not clear to pass her. Respondent admitted that *Drill Boat No. 3* sounded no whistle signals (pretrial order, R. 15-16), and therefore, failed in these statutory duties.

Article 18, Rule III of the Inland Rules, 33 U. S. C. §203, provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, no less than four of the steam whistle."

The *Baltimore* sounded a series of such signals, each followed by a repetition of the one long blast (R. 30, 76, 85,

124-125). *Drill Boat No. 3* did not respond to these danger signals. The *Baltimore's* danger signals required a response by the *Drill Boat No. 3;* her failure to make any response was a further statutory fault. *Deep Sea Tankers* v. *The Long Branch,* 258 F. 2d 757, 765 (2 Cir. 1958); *certiorari denied,* 358 U. S. 933, *rehearing denied,* 359 U. S. 921; *Esso Standard Oil Co.* v. *The President Garfield,* 279 F. 2d 540, 542-543 (2 Cir. 1960). The latter case held,

> "This being the case the *President Garfield* had the heavy burden of establishing that this fault could not have contributed to the collision. *The Pennsylvania,* 1874, 19 Wall, 125, 136, 86 U. S. 125, 136, 22 L. Ed. 148; Afran Transport Co. *v.* The Bergechief, 2 Cir., 1960, 274 F. 2d 469, 473; Sinclair Refining Co. *v.* The Magnolia Dolphin, 2 Cir. 1959, 272 F. 2d 192."

Both lower courts found that respondent's drill boat did not sound any of the required whistle signals in response to the *Baltimore's* whistle signals (R. 4, A-2), but failed to place *any* burden of fault upon the drill boat, respondent having introduced no evidence. Both courts apparently deciding that possible inconsistencies in petitioner's evidence could be treated as though conflicting versions from two parties. Such was not the case, and yet the Circuit Court erroneously so concluded (A-3).

In recognition of the potential hazard created by floating plants operating in navigable waters, the Government has placed further statutory restrictions upon them. 33 C. F. R. 80.30 provides that the

> *"Channel shall not be obstructed unnecessarily by any dredge or other floating plant."*

And, in the event that the foregoing statutory measures do not guarantee clear passage in narrow channels for navigating vessels, the floating plant is required by 33

C. F. R. 80.31 to move out of the way, unless the Secretary of the Army, upon respondent's application, had closed the area to vessel traffic. Since respondent did not put in a defense, there was no proof of any application by appellee requesting that the movement of vessels be prohibited in the Pralls' Island Reach of Arthur Kill. *Drill Boat No. 3,* therefore, had no official sanction to prevent the *Baltimore's* passing. Absent that, she was under statutory compulsion to do everything possible to assist the *Baltimore* in passing. It was clear from the evidence that *Drill Boat No. 3* did nothing to assist the *Baltimore.*

Drill Boat No. 3 could move back and forth across the channel with no difficulty by pulling on her anchors with her winches which were implanted near either shore (R. 102). When asked to move following the grounding, she moved quite rapidly toward the New Jersey shore, faster than a tug could push her (R. 94-95). Obviously *Drill Boat No. 3* could have taken steps during the fifteen minutes the approaching *Baltimore* was signaling to her prior to the grounding (R. 29, 66, 89-90; Ex. 3, A. 152-153) to give the *Baltimore* adequate room to pass on either side of the channel.

Both the District Court and Circuit Court found, in error, unsupported by evidence that the drill boat was "non-selfpropelled" (R. 4, A-2).

The position of *Drill Boat No. 3* just below this major bend in the channel was dangerously obstructive and the channel edge is unmarked by navigational aids below the bend on the Staten Island (Eastward) side (A. 60; Ex. 4, A. 154). Because of the drill boat's position below the bend, it was difficult to tell her exact position with relation to the channel width.

Realizing this (R. 117-119), respondent should have been particularly careful to insure a proper lookout was kept

to advise of approaching traffic and to listen for whistle signals, since the drill boat had statutory obligations to other vessels navigating the channel. However, *Drill Boat No. 3* sounded no signals to, and took no action with regard to the *Baltimore*. This was obviously because there was no designated lookout aboard the drill boat (R. 106). This violation of 33 U. S. C. 221 invokes the doctrine of *The Pennsylvania*, 19 Wall. 125, 136, 22 L. Ed. 148, as do the other statutory violations here involved. *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2d 537, 539 (2 Cir. 1959). Respondent produced no evidence to meet that burden and, therefore, the District Court concluded erroneously that this fault could not have contributed to the *Baltimore's* grounding (R. 3, 6).

The District Court agreed with petitioner's contentions that *Drill Boat No. 3's* position was obstructive; that she did not maintain a lookout; and that she failed to sound the signals prescribed by the Inland and Pilot Rules (R. 3, 6).

Although respondent introduced no evidence to prove that these faults could not have contributed to the *Baltimore's* grounding, the District Court concluded that:

> "• • • *any breach of statutory duty by the Drill Boat because of its failure to give a passing or other appropriate signal required by the Pilot Rules for Inland Waters, or any other claimed statutory fault could not have contributed to the occurrence*" (R. 3).

The Circuit Court affirmed despite these statutory violations (A-3).

In *The Fort Fetterman* v. *South Carolina State Highway Department*, 261 F. 2d 563 (4 Cir. 1958), the Fourth Circuit clearly stated the law ignored by the Second Circuit,

> "• • • We believe that the factual situation here presented calls for the clear application of the rule

as stated in *The Pennsylvania,* 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, to the effect that *the burden rests upon the party guilty of a statutory fault to show, not only that probably his fault did not contribute to the disaster, but that it could not have done so"* (p. 567).

"* * * we believe that, at best, a critical analysis of the opinions from the United States Supreme Court leads to the conclusion * * * that the 'reasonable possibility' test is appropriate. Indeed, in 1894 the Supreme Court expressly stated that *The Pennsylvania* rule refers to 'possibility' rather than 'probability'. The Martello, 153 U. S. 64, 14 S. Ct. 723, 38 L. Ed. 637. In other cases the court has pointed out that *The Pennsylvania* rule is the settled rule and should be strictly applied. *Richelieu & Ontario Nav. Co.* v. *Boston Marine Ins. Co.,* 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398; *Belden* v. *Chase,* 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218; *Lie* v. *San Francisco & Portland S. S. Co.,* 243 U. S. 291, 37 S. Ct. 270, 61 L. Ed. 726" (pp. 568-569).

"*The Pennsylvania* rule, while not perhaps nullifying the doctrine of proximate cause in admiralty, undoubtedly *creates a strong presumption that the material statutory fault is one of the contributing causes of the accident, and places upon the offender the burden of establishing that such violation could not, with 'reasonable possibility', have contributed to the collision* * * *" (p. 569). (Italics ours)

The normal rule is that positive testimony of persons charged with navigation of a moving vessel should not be lightly disregarded. *Philadelphia & R. R. Co.* v. *River & Harbor Improvement Co.,* 193 Fed. 109 (3 Cir. 1910) and *John H. Starin,* 112 Fed. 236 (2 Cir. 1903). In this trial, the *only* witnesses produced were petitioner's, giving their testimony even greater weight.

Since respondent introduced no testimony, this Court, as did the lower courts, has only the information submitted by petitioner to evaluate, which is buttressed by respondent's failure to produce *Drill Boat No. 3's* crew members. The only logical, and indeed, necessary legal inference to be derived from the failure to produce vital testimony within respondent's control was that, if these witnesses had been called, their testimony would have been adverse to respondent's interests, and would have confirmed petitioner's evidence that *Drill Boat No. 3's* failure to comply with her statutory duties was responsible for the *Baltimore's* grounding outside the channel. *Clifton* v. *United States,* 45 U. S. 242, 246; *The New York,* 175 U. S. 187, 204-205.

Conclusion.

Each of the several issues presented by the decision below is believed to involve a question of jurisprudence or procedure which is not restricted to admiralty. In addition, the decision on each of these issues conflicts with the decisions of other courts of appeals, or reflects a lack of uniformity, and is in conflict with basic principles laid down by this Court. It is accordingly requested that a writ of certiorari to review the decree of the court below be granted.

Respectfully submitted,

David C. Wood,
Counsel for Petitioner,
26 Broadway,
New York, N. Y. 10004

Hill, Betts, Yamaoka, Freehill
& Longcope,
of Counsel.

APPENDIX A.

Opinion.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 94—September Term, 1964.

(Argued October 1, 1964 Decided November 2, 1964.)

Docket No. 28326.

CITIES SERVICE OIL COMPANY, as owner of the Steamship *Cities Service Baltimore*,
Libellant-Appellant,

v.

THE ARUNDEL CORPORATION,
Respondent-Appellee.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and MARSHALL, *Circuit Judges*.

Appeal by libellant shipowner from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, dismissing its suit for damages resulting from the grounding of its ship.

Affirmed.

DAVID C. WOOD, New York, N. Y. (ELI ELLIS, HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE, New York, N. Y., on the brief), for libellant-appellant.

Opinion.

JOHN H. HANRAHAN, New York, N. Y. (FOLEY & MARTIN, New York, N. Y., on the brief), for respondent-appellee.

PER CURIAM:

Cities Service Oil Company appeals from a judgment dismissing its libel against the Arundel Corporation. Libellant's supertanker, the *Cities Service Baltimore,* was in the Prall's Island Reach, en route from a Staten Island anchorage to the Cities Service dock at Linden, New Jersey, when it ran aground while attempting to pass Drill Boat No. 3, a non-selfpropelled dredge owned by respondent. Libellant brought this action in the United States District Court for the Southern District of New York for the resulting damages.

Cities Service Baltimore is an oceangoing tanker, 661 feet long and 91 feet wide; heavily laden on this voyage, she drew 32 feet, 4 inches forward and 32 feet, 3 inches aft. The Prall's Island Reach channel is 400 feet wide where the accident occurred, with a controlling depth—minimum depth of the channel at mean low water as found in government surveys—of twenty-nine and a half or thirty feet.

On December 2, 1957, Drill Boat No. 3 was engaged in deepening the channel under contract with the Corps of Engineers and was anchored near mid-channel. As *Cities Service Baltimore* approached the drill boat, the tanker sounded its whistle as required by the pilot rules. Though the rules also state that the dredge should reply by indicating the side on which the ship should pass, the drill boat did not respond either to the tanker's first signal or to its subsequent signals. However, Captain Herbert C. Hunter, the tanker's master, testified that drill boats rarely reply to such signals.

After consultation among the pilot and the tanker's officers, it was decided to pass to the east of the dredge, and the tanker went aground as it drew abreast of it. Libellant's theory is that there was a considerable risk of stray-

ing outside the channel unless the drill boat assisted by moving from the center of the channel and by giving proper signals, that these failures violated the drill boat's statutory duty, and that the grounding resulted from the violations. It is essential to this theory that the grounding be found to have occurred outside the channel; otherwise, the *Cities Service Baltimore* grounded simply because her draft was too great for the channel at the existing tide. Whether it did or not is a question of fact, which Judge Weinfeld resolved in favor of the respondent.

Evidence bearing on the question where the ship grounded was of two kinds: direct evidence as to the ship's location and evidence as to whether it was physically possible for a ship of the tanker's draft to go aground within the channel at the time that the grounding occurred which was at high tide. There was conflicting evidence on both points, and resolution of the conflict depended on the relative weight given to various kinds of evidence, traditionally a matter for the trier of fact. Judge Weinfeld's finding was directly supported by the testimony of Captain Thomas J. Port, the pilot in charge of the vessel at the time of the grounding. He testified that he believed that the ship went aground within the channel and that the cause of the accident was a lower than predicted tide. On the record before us, we cannot say that Judge Weinfeld's finding was clearly erroneous.

Once it is decided that the tanker went aground within the channel, judgment for the respondent necessarily follows. All available information showed that the same controlling depth, whether it was twenty-nine and a half or thirty feet, prevailed for the full width of the channel. In other words, one course within the channel appeared to be as good as another, and the acts and omissions of the drill boat did not increase the tanker's chances of grounding within the channel.

The judgment of the district court is affirmed.

APPENDIX B.

Judgment.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of November one thousand nine hundred and sixty-four.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. HENRY J. FRIENDLY,
Hon. THURGOOD MARSHALL,
Circuit Judges.

CITIES SERVICE OIL COMPANY, as owner of the Steamship *Cities Service Baltimore*,
Libelant-Appellant,

v.

THE ARUNDEL CORPORATION,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to Respondent-Appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.

Denial of Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

CITIES SERVICE OIL COMPANY as owner of the Steamship *Cities Service Baltimore*,
Libelant-Appellant,

v.

THE ARUNDEL CORPORATION,
Respondent-Appellee.

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE, New York, N. Y., for libelant-appellant.

Petition denied.

J. E. L.
H. J. F.
T. M.
U.S.C.JJ.

15 December 1964

Appendix C.

Order Denying Petition.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of December, one thousand nine hundred and sixty-four.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge.
Hon. HENRY J. FRIENDLY,
Hon. THURGOOD MARSHALL,
Circuit Judges.

CITIES SERVICE OIL COMPANY, as Owner of the Steamship *Cities Service Baltimore,*
Libelant-Appellant,

v.

THE ARUNDEL CORPORATION,
Respondent-Appellee.

A petition for a rehearing having been filed herein by counsel for the Appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX D.

Order Extending Time to File Petition for Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. .....

CITIES SERVICE OIL COMPANY AS OWNER OF THE STEAMSHIP CITIES SERVICE BALTIMORE,

Petitioner,

v.

THE ARUNDEL CORPORATION

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including March 22, 1965.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 15th day of March, 1965.

APPENDIX E.

Rules 16 and 52 of the Federal Rules of Civil Procedure.

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts

specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Jan. 21, 1963, eff. July 1, 1963.

* * * * * *

Regulations Concerning Passing Floating Plant Working in Navigable Waters.

33 C. F. R. §80.26 (Pilot Rule 80.26)

§80.26 Passing Signals.

(a) Vessels intending to pass dredges or other types of floating plant working in navigable channels, when within a reasonable distance therefrom and not in any case over a mile, shall indicate such intention by one long blast of the whistle, and shall be directed to the proper side for passage by the sounding, by the dredge or other floating plant, of the signal prescribed in the local pilot rules for vessels under way and approaching each other from opposite directions, which shall be answered in the usual manner by the approaching vessel. If the channel is not clear, the floating plant shall sound the alarm or danger signal and the

approaching vessel shall slow down or stop and await further signal from the plant.

* * * * * *

33 C. F. R. §80.30

§80.30 OBSTRUCTION OF CHANNEL BY FLOATING PLANT.

Channels shall not be obstructed unnecessarily by any dredge or other floating plant. While vessels are passing such plant, all lines running therefrom across the channel on the passing side, which may interfere with or obstruct navigation, shall be slacked to the bottom of the channel.

33 C. F. R. §80.31

§80.31 CLEARING OF CHANNELS.

When special or temporary regulations have not been prescribed and action under the regulations contained in §§80.26 to 80.30, will not afford clear passage, floating plant in narrow channels shall, upon notice, move out of the way of vessels a sufficient distance to allow them a clear passage. Vessels desiring passage shall, however, give the master of the floating plant ample notice in advance of the time they expect to pass.

NOTE: If it is necessary to prohibit or limit the anchorage or movement of vessels within certain areas in order to facilitate the work of improvement, application should be made through official channels for establishment by the Secretary of the Army of special or temporary regulations for this purpose.

Article 18, Rule III of the Navigation Rules for Harbors, Rivers and Inland Waters, 33 U. S. C. §203.

§203. STEAM VESSELS APPROACHING, MEETING, OR PASSING ONE ANOTHER; BANKS OBSTRUCTING VIEW; LEAVING DOCK (ART. 18)

* * * * * *

RULE III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle.

• • • • • •

Article 29 of the Navigation Rules for Harbors, Rivers and Inland Waters, 33 U. S. C. §221.

NO VESSEL UNDER ANY CIRCUMSTANCES TO NEGLECT PROPER PRECAUTIONS

§221. USUAL ADDITIONAL PRECAUTIONS REQUIRED GENERALLY (ART. 29)

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. June 7, 1897, c. 4, §1, 30 Stat. 102.

33 U. S. C. §409, under the Protection of Navigable Waters.

§409. OBSTRUCTION OF NAVIGABLE WATERS BY VESSELS; FLOATING TIMBER; MARKING AND REMOVAL OF SUNKEN VESSELS

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; • • • Mar. 3, 1899, c. 425, §15, 30 Stat. 1152.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1014.

CITIES SERVICE OIL COMPANY, as Owner of the SS. *Cities Service Baltimore,*

Petitioner,

against

THE ARUNDEL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Statement

At the end of petitioner's case in Admiralty in the District Court, respondent, believing that petitioner had failed to make out a case, rested. The following testimony was developed up to that point.

The *Cities Service Baltimore* got underway from anchorage at Stapleton off Staten Island at 0152 on December 2, 1957. The vessel was carrying petroleum products and was bound for Linden, New Jersey. On that voyage she was navigated by a Sandy Hook pilot (R. 23, 25, 67, 89, 123).

When the *Cities Service Baltimore* arrived at the Gulfport Reach in the Arthur Kill she says she blew various signals to Drill Boat No. 3, owned by respondent, which was working in the area ahead but that no answer was received (R. 4). Nevertheless, the *Cities Service Baltimore* continued underway intending to pass the drill boat, which was about midstream, to the eastward (R. 5).

While so proceeding the *Cities Service Baltimore* went aground within the channel (A-3 of petition).

The petition for writ of certiorari should be denied for the following reasons:

1. Petitioner contends that respondent's defense was not within the pre-trial order. Part viii c (R. 15-16) reads as follows:

> "(viii) The issues to be tried are formulated by the court as follows: * * *
>
> "(c) whether any action of the respondent or failure of action by the respondent caused or contributed to the grounding of the *Cities Service Baltimore;* and whether any action or failure of action on the part of the *Cities Service Baltimore* caused or contributed to the grounding of the *Cities Service Baltimore.*"

By showing that the grounding of the *Cities Service Baltimore* occurred within the channel, respondent was showing that no action by it nor any failure of action by it caused or contributed to the grounding and such defense is clearly within the pre-trial provision quoted immediately above.

2. Petitioner argues, page 13 of the petition, that "There was no affirmative testimony that the vessel

grounded within the channel." Such argument is incorrect. Both the District Court and the Court of Appeals referred to the evidence and held not only that there was affirmative evidence that the grounding occurred within the channel but also held that such evidence should be believed. The Court of Appeals in referring to that aspect of the case (A-3 of Petition) stated:

> "Judge Weinfeld's finding was directly supported by the testimony of Captain Thomas J. Port, the pilot in charge of the vessel at the time of the grounding. He testified that he believed that the ship went aground within the channel and that the cause of the accident was a lower than predicted tide. On the record before us, we cannot say that Judge Weinfeld's finding was clearly erroneous."

3. Although petitioner has made various arguments, in summation it can be stated that all of them are premised on the assertion that the grounding occurred outside of the channel and not within the channel. The same argument was made to the District Court and the District Court held that the grounding occurred within the channel. Likewise, the same argument was made before the Court of Appeals and the Court of Appeals held that the grounding occurred within the channel.

Petitioner offers no substantial reason for the granting of this petition. It has not shown any conflict of opinion nor has it shown that the issue is of such importance to warrant review by this Court. It is simply arguing about a disputed question of fact. The case falls within the law as laid down by *Magnum Co.* v. *Coty*, 262 U. S. 159 where this Court held, at page 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision

between those Courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing" (italics ours).*

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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